Supreme Court, U.S.
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No. 93-1482

In The

Supreme Court of the United States

October Term, 1993

JESSIE ROSE, WIDOW OF GUY T. ROSE,

Petitioner,

v.

WESTMORELAND COAL COMPANY
AND
DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF RESPONDENT, WESTMORELAND COAL COMPANY IN OPPOSITION

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QUESTION PRESENTED

Whether the perceived errors cited by the Petitioner present "special and important reasons" which warrant the Court's review?

LIST OF PARTIES AND RULE 29.1 STATEMENT

Jessie Rose ("Mrs. Rose") is a claimant for benefits under the Black Lung Benefits Act. Westmoreland Coal Company has one subsidiary which is not wholly owned, Westmoreland Resources. The Director, Office of Workers' Compensation Programs, United States Department of Labor, is the Administrator of the Black Lung Program, and is a statutory party in all black lung claims. 30 U.S.C. § 932(k).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES AND RULE 29.1 STATEMENT ... ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

STATUTES AND REGULATIONS INVOLVED 2

STATEMENT OF THE CASE 2

ARGUMENT 4

THE PERCEIVED ERRORS CITED BY THE PETITIONER DO NOT PRESENT "SPECIAL AND IMPORTANT REASONS" WHICH WARRANT THE COURT'S REVIEW 4

CONCLUSION 6

TABLE OF AUTHORITIES

Page

Mullins Coal Co. v. Director, OWCP, 484 U.S. 135 (1987) 3

Rice v. Sioux City Cemetery, 349 U.S. 70 (1955) 4

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The Respondent, Westmoreland Coal Company, respectfully opposes the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit. As this case does not involve any special and important issues, it does not warrant the attention of this Court.

OPINIONS BELOW

The decisions and orders of the Administrative Law Judge, the Benefits Review Board and the U.S. Court of Appeals for the Fourth Circuit are unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 23, 1993 and a petition for rehearing was denied on December 21, 1993. The jurisdiction of the Court of Appeals was invoked pursuant to 33 U.S.C. § 921(c) (1988), which is incorporated by Section 422(a) of the Federal Black Lung Benefits Act, 30 U.S.C. § 932(a) (1988). The Petition for Writ of Certiorari was filed on March 21, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTES AND REGULATIONS INVOLVED

5 U.S.C. § 551 *et seq.* (1988)

30 U.S.C. §§ 901-945 (1988)

20 C.F.R. § 410.490

STATEMENT OF THE CASE

This claim arose out of a claim for benefits filed under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, known as the Black Lung Benefits Act. 30 U.S.C. §§ 901-945 (1988). Guy T. Rose worked

for Westmoreland for nine years and eight months between 1950 and 1976. During his employment, he underwent pre-employment physical examinations in 1955, 1959 and 1974, all of which included an x-ray. The latter x-ray was reread as negative for coal workers' pneumoconiosis by two NIOSH certified B readers.[1] Mr. Rose passed away in 1976.

His widow, Jessie Rose, filed a claim for survivor's benefits under the Black Lung Benefits Act in 1976. Following a formal hearing, the Administrative Law Judge ("ALJ") held that Mrs. Rose had failed to establish her entitlement to benefits under the Part C interim criteria. Although that finding was affirmed by the Benefits Review Board, the claim was remanded for the ALJ to consider the claim under the more liberal criteria at 20 C.F.R. § 410.490. On remand, the ALJ held that the x-ray evidence was insufficient to establish the existence of pneumoconiosis. In doing so, he accorded determinative weight to the opinions of more qualified physicians, the B readers. His credibility determinations and denial of benefits were affirmed by the Benefits Review Board and the Fourth Circuit Court of Appeals.

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[1] A B-reader is a physician who has been specially certified as having demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis. See *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 145 n.16 (1987).

ARGUMENT

1. THE PERCEIVED ERRORS CITED BY THE PETITIONER DO NOT PRESENT "SPECIAL AND IMPORTANT REASONS" WHICH WARRANT THE COURT'S REVIEW.

Mrs. Rose alleges that the ALJ violated the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.* (1988), by "ignoring" two items of evidence relative to the existence of pneumoconiosis. That allegation is not supported by the evidence of record as the ALJ properly considered all relevant and probative evidence in determining whether the existence of pneumoconiosis had been established under Section 410.490. Mrs. Rose further argues that Westmoreland should not be permitted to "escape" its admission that Mr. Rose had pneumoconiosis. That argument is likewise unsupported by the record as Westmoreland has consistently controverted in this black lung claim the allegation that Mr. Rose had pneumoconiosis. In any event, the Court should decline review of this case as the perceived errors are of interest to the parties alone and do not present "special and important reasons" which would justify this Court's attention.

The granting of a petition for writ of certiorari is purely discretionary. Because of the plethora of legal problems presented to the Court for consideration, only those petitions for a writ of certiorari which present "special and important reasons therefor" are granted. " 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic." *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955). Petitions for a writ of

certiorari are not granted "except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties." 349 U.S. at 79. This case does not present such principles.

The question presented by the Petitioner for review by this Court is whether the trier-of-fact properly decided a question of fact in a federal black lung claim. The Petitioner is, in essence, requesting the Court to conduct a substantial evidence review of the trier-of-fact's decision and order. The Benefits Review Board, the administrative appellate body of the U.S. Department of Labor, and the Fourth Circuit Court of Appeals, which, by statute, are the reviewing bodies in these claims, have already performed that function. Both held that the ALJ's findings of fact are supported by substantial evidence of record and are consistent with the applicable law. This Court's consideration of this case will not "settle" a principle of importance to the public. Rather, the question presented is of interest to the particular parties alone. While the case is obviously important to the parties involved, the question presented for review does not present the type of issue which warrants the Court's attention.

CONCLUSION

The Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit should be denied.

Respectfully submitted,

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